

No. 14712

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ELLEN MOLNAR,

Plaintiff and Appellant,

vs.

NATIONAL BROADCASTING COMPANY, INC., a corporation,
et al.,

Defendants and Appellees.

APPELLANT'S OPENING BRIEF.

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Statement of Pleadings and Facts.

A complaint for personal injuries was filed by appellant in the United States District Court for the Southern District of California, Central Division. Paragraph II of said complaint alleges as follows:

“Plaintiff is a citizen and resident of the State of California; defendants, and each of them, are citizens and residents of the State of Delaware” [R. pp. 3-4].

Paragraph III of said complaint alleges as follows:

“This is an action wholly between citizens of different states involving an amount in controversy in excess of \$3000.00, exclusive of interest and costs” [R. p. 4].

Before any appearance of the defendants, an order was made by Judge Mathes dismissing the action for want of jurisdiction over the subject matter [R. p. 7].

This is an appeal from said order of dismissal on the ground that the court did have jurisdiction under 28 U. S. C., Section 1332.

Statement of the Case and Question Involved.

The sole question involved on this appeal from said order of dismissal is as follows:

WHERE A COMPLAINT NAMES CERTAIN UNKNOWN DEFENDANTS (DOES) AND ALLEGES THAT SAID UNKNOWN DEFENDANTS ARE CITIZENS AND RESIDENTS OF THE SAME STATE AS THE KNOWN, NAMED DEFENDANTS, WHICH STATE OF CITIZENSHIP AND RESIDENCE IS DIVERSE FROM THAT OF PLAINTIFF, DOES THE UNITED STATES DISTRICT COURT HAVE JURISDICTION OF THE CASE ON THE BASIS OF DIVERSITY OF CITIZENSHIP, ASSUMING THE AMOUNT IN CONTROVERSY TO BE IN EXCESS OF \$3,000.00, EXCLUSIVE OF INTEREST AND COSTS?

The learned trial judge, Judge Mathes, held that under those circumstances there was not the complete required diversity of citizenship and so dismissed the action. A copy of Judges Mathes' opinion is annexed hereto and marked "Appendix A."

Specification of Errors Relied On.

The sole error complained of on this appeal is that the court erred in dismissing the complaint for lack of jurisdiction.

Argument.

Our research has failed to disclose any reported cases other than those cited by Judge Mathes.

However, this precise point is raised in the case of *Roth v. Will Mastin Trio, et al.*, U. S. Court of Appeals No. 14713, now pending on appeal in this court. In that case a motion to dismiss based on the same reason, was *denied* by Judge Harrison. We respectfully refer this court to the brief to be filed in that case.

Appellant herein intends to move for a consolidation of these cases on appeal.

Respectfully submitted,

WILLIAM R. LUND,

WM. JEROME POLLACK,

VIVIAN M. FELD,

Attorneys for Appellant.







APPENDIX A.

United States District Court, for the Southern District of California, Central Division.

Ellen Molnar, Plaintiff, v. National Broadcasting Company, Inc., a corporation, Doe I-X, Defendants.

No. 17853-WM Civil.

ORDER DISMISSING ACTION FOR WANT OF JURISDICTION OVER THE SUBJECT MATTER.

It appearing to the Court:

(1) that the record in this cause does not disclose complete diversity of citizenship between the parties [28 U. S. C., §1332; Indianapolis v. Chase National Bank, 314 U. S. 63, 69-70, 76-77 (1941); Parker v. Overman, 18 How. (59 U. S.) 137, 141 (1855); Mullen v. Torrance, 9 Wheat. (22 U. S.) 537, 538 (1824)];

(2) that there is no claim or cause of action asserted in the complaint which "arises under the Constitution, laws or treaties of the United States" [28 U. S. C., §1331; Gully v. First National Bank, 299 U. S. 109, 112-114 (1936); Puerto Rico v. Russell & Co., 288 U. S. 476, 483-484 (1933); Hooe v. United States, 218 U. S. 322, 335-336 (1910); Scribner v. Straus, 210 U. S. 352 (1908); Wade v. Lawder, 165 U. S. 624 (1897); Dale Tile Mfg. Co. v. Hyatt, 125 U. S. 46 (1888); Republic Pictures Corp. v. Security etc. Bank, 197 F. 2d 767 (9th Cir. 1952)];

(3) that inasmuch as facts requisite to federal jurisdiction [Fed. Rules Civ. Proc., Rule 8(a)(1), 28 U. S. C. A. 252 (1950)] do not affirmatively appear [Robertson v. Cease, 97 U. S. 646, 648-650 (1878);

Ex Parte Smith, 94 U. S. 455, 456 (1876)], this court of limited jurisdiction [Shamrock Oil Co. v. Sheets, 313 U. S. 100, 108-109 (1941)] presumably lacks jurisdiction of the cause [Bors v. Preston, 111 U. S. 252, 255 (1884); Grace v. American Central Ins. Co., 109 U. S. 278 (1883); Turner v. Bank of North America, 4 Dall. (4 U. S.) 7, 11 (1800) New York Life Ins. Co. v. Kaufman, 78 F. 2d 398, 400 (9th Cir. 1935)];

It Is Ordered upon the Court's own initiative [Fed. Rules Civ. Proc., Rule 12(h), 28 U. S. C. A.] that the action is hereby dismissed for lack of jurisdiction over the subject matter [Fed. Rules Civ. Proc., Rule 12(b)(1), 28 U. S. C. A.].

It Is Further Ordered that this dismissal shall not operate as an adjudication upon the merits [Fed. Rules Civ. Proc., Rule 41(b), 28 U. S. C. A.].

It Is Further Ordered that the Clerk this day serve copies of this order by United States mail upon the attorneys for the parties appearing in this cause.

February 10, 1955.

Wm. C. Mathes

United States District Judge

Endorsed: Filed Feb. 11, 1955. Edmund L. Smith, Clerk
by C. A. Simmons, Deputy Clerk.

Judgment Docketed and Entered Feb. 11, 1955, Edmund
L. Smith, Clerk; by C. A. Simmons, Deputy Clerk.